

89-268

Supreme Court, U.S.

FILED

AUG 10 1989

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

**In the
United States Supreme Court**

October Term, 1989

CORRECTIONS SECURITY OFFICERS
TERRY BORDELON, BLAINE K. EDWARDS, AND
BENNY K. EDWARDS,

Petitioners,

v.

PRISONER EDDIE LEE MARSHALL,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED

1. Does the Eleventh Amendment bar a federal court from adjudicating a state law claim that demands retro-active money damages as relief when jurisdiction to hear the state law claim is pended to a federal question?

2. Does the Tenth Amendment bar a federal court from adjudicating a state law tort claim brought by a state prisoner against state corrections officers?

3. Are unauthorized, random, and isolated acts of force by state corrections security officers which are not related to prison security needs prohibited by the Eighth Amendment?

4. If unauthorized, random, and isolated acts of force by state corrections security officers which are not related to prison security needs are proscribed by the Eighth Amendment's prohibition against cruel and unusual punishment, is serious injury an essential element of that claim?

LIST OF PARTIES

The parties to the proceedings below in the United States Court of Appeals for the Fifth Circuit were the petitioners Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards and the respondent, Prisoner Eddie Lee Marshall. Ross Maggio, Jr., Warden of the Louisiana State Penitentiary, was also a party to the proceedings below in the United States Court of Appeals for the Fifth Circuit.

C. Paul Phelps, Secretary of the Louisiana Department of Public Safety and Corrections, C. M. Lensing, Deputy Warden, Roger Thomas, Assistant Warden of the Louisiana State Penitentiary, and Corrections Security Officers Myron Dozat, Dave Kelone, Paul I. Dupuis, Sam Dupont, and Ivy Deville were also parties to the proceedings before the United States District Court for the Middle District of Louisiana.

The petitioners before This Court are Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards. The respondent before This Court is Prisoner Eddie Lee Marshall.

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The petitioners, Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards respectfully pray that a writ of certiorari issue to review the orders and opinions of the United States Court of Appeals for the Fifth Circuit, entered on May 16, 1989, and March 8, 1989.

OPINION BELOW

The opinions of the Court of Appeals and District Court were not reported. A copy of the denial of the rehearing or rehearing en banc by the Court of Appeal is attached to this petition as Exhibit A of the Appendix to the petition. A copy of the opinion and order of the Court

of Appeals affirming the judgment of and adopting the reasons for the judgment by the District Court is attached to this petition as Exhibit B of the Appendix to the petition. The opinion of the District Court is attached to this petition as Exhibit C of the Appendix to the petition. The judgment of the District Court is attached to this petition as Exhibit D of the Appendix to the petition.

JURISDICTION

Prisoner Eddie Lee Marshall, a Louisiana prisoner housed at the Louisiana State Penitentiary, brought suit against twelve Louisiana prison authorities in the United States District Court for the Middle District of Louisiana. Prisoner Eddie Lee Marshall invoked federal jurisdiction under 42 USC Section 1983 alleging violations of the Eighth and Fourteenth Amendments to the United States Constitution. Prisoner Eddie Lee Marshall also invoked pendent jurisdiction for alleged violations of Louisiana law. Prisoner Eddie Lee Marshall was granted in forma pauperis status under 42 USC Section 1915. The parties waived trial by jury and consented to disposition by a United States Magistrate pursuant to 28 USC Section 636 (c). Following a bench trial, the District Court entered its opinion on July 7, 1988, in which Corrections Security Officers Blaine K. Edwards and Benny K. Edwards were found to have violated Prisoner Eddie Lee Marshall's Eighth Amendment right to be free from cruel and unusual punishment by the intentional use of unnecessary force, and committed a simple battery and assault on him in violation of Louisiana Civil Code Article 2315 through Louisiana Revised Statutes 14:35 and 14:38. Corrections Security Officers Terry Bordelon, Blaine K.

Edwards, and Benny K. Edwards were also found to have violated Louisiana Civil Code Article 2315 through Louisiana Revised Statute 14:72 by making false prison disciplinary reports on Prisoner Eddie Lee Marshall. Warden Ross Maggio was found to have violated Louisiana Civil Code Article 2315 because he breached a duty under Louisiana law to investigate Prisoner Eddie Lee Marshall's allegations of being wrongfully placed in disciplinary confinement. Corrections Security Officers Blaine K. Edwards and Benny K. Edwards were held in damages on the federal law claim and the state law claim for Six Hundred (\$600.00) Dollars in compensatory and Two Thousand (\$2000.00) Dollars in punitive damages. Corrections Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards and Warden Ross Maggio were held in damages on the other state law claims for One Thousand Two Hundred (\$1,200.00) Dollars in compensatory damages.¹

Warden Maggio and Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards appealed the judgment of the District Court to the United States Court of Appeals for the Fifth Circuit. A

¹Prisoner Eddie Lee Marshall also sued in the District Court, C. Paul Phelps, the former Secretary of the Louisiana Department of Corrections, Roger Thomas, an Assistant Warden at the Louisiana State Penitentiary, C. M. Lensing, former Deputy Warden at the Louisiana State Penitentiary, and Dave Kelone, Myron Dozat, Paul L. Dupuis, Sam DuPont and Ivy Deville, all Corrections Security Personnel at the Louisiana State Penitentiary. None of these defendants was found liable either under a federal or state law claim to Prisoner Eddie Lee Marshall at the District Court level. They did not appeal to the Court of Appeals and are not seeking review by This Court.

three judge panel of the Court of Appeals after briefing and oral argument, issued on March 8, 1989, a Three (3) sentence opinion affirming the judgment of the District Court for the reasons stated in the District Court as to Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards. The three judge panel of the Court of Appeals, however, reversed the judgment of the District Court as to Warden Ross Maggio. Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards then filed a timely petition for rehearing en banc, which was treated as a suggestion for rehearing by the panel, which was denied on May 16, 1989.²

The jurisdiction of This Court to review the opinion and orders of the United States Court of Appeals for the Fifth Circuit is invoked under 28 USC Section 1254 (1) and 1259.

STATUTES INVOLVED

A Constitutional provision involved is the Eighth Amendment to the United States Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

A Constitutional provision involved is the Tenth Amendment to the United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Warden Ross Maggio, a former Warden of the Louisiana State Penitentiary, did not seek a rehearing of the opinion and order of the panel of the Appeals Court and does not seek review by This Court.

A Constitutional provision involved is the Eleventh Amendment to the United States Constitution:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

A Constitutional provision involved is the Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute involved in this case is 42 U.S.C. Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

A Louisiana Statute involved in this case is Louisiana Civil Code Article 2315, which is reproduced in the Appendix to the petition as Exhibit E.

A Louisiana Statute involved is Revised Statute 13:5108.1 which is reproduced in the Appendix to this petition as Exhibit F.

A Louisiana Statute involved is Revised Statute 13:5108.2 which is reproduced in the Appendix to the petition as Exhibit G.

A Louisiana Statute involved is Revised Statute 14:35:

"Simple battery is a battery committed without consent of the victim.

Whoever commits a simple battery shall be fined not more than five hundred dollars, or imprisoned for not more than six months or both."

A Louisiana Statute involved is Revised Statute 14:38:

"Simple assault is an assault committed without a dangerous weapon.

Whoever commits a simple assault shall be fined not more than two hundred dollars, or imprisoned for not more than ninety days, or both."

A Louisiana Statute involved is Revised Statute 14:72:

"Forgery is the false making or altering, with intent to defraud, of any signature to, or any part of, any writing purporting to have legal efficacy.

Issuing or transferring, with intent to defraud, a forged writing, known by the offender to be a forged writing, shall also constitute forgery.

Whoever commits the crime of forgery shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, for not more than ten years, or both."

STATEMENT OF THE CASE

Prisoner Eddie Lee Marshall, an inmate at the Louisiana State Penitentiary, brought an action against a number of the prison's officials and employees in the United States District Court for the Middle District of Louisiana pursuant to 42 U.S.C. Section 1983 alleging violations of the Eighth and Fourteenth Amendment and invoking pendent jurisdiction to adjudicate several Louisiana state law claims.

On March 21, 1984, Prisoner Eddie Lee Marshall was ordered by Corrections Security Officer Blaine K. Edwards to perform an act which Prisoner Eddie Lee Marshall refused to do. Prisoner Eddie Lee Marshall was then told by Corrections Officer Blaine K. Edwards to go to his cell and pack his belongings because he was going to be given a prison disciplinary report and placed in administrative lockdown until his disciplinary hearing. Prisoner Eddie Lee Marshall packed his belongings and met Corrections Security Officer Benny K. Edwards in the lobby of the unit, where his property was to be inventoried. In the lobby, a scuffle occurred between Prisoner Eddie Lee Marshall and Corrections Security Officers Benny K. Edwards and Blaine K. Edwards. The District Court found that Corrections Security Officers Benny K. Edwards and Blaine K. Edwards started the scuffle with Prisoner Eddie Lee Marshall. The scuffle resulted in only very minor cuts and bruises to Corrections Security Officers Benny

K. Edwards and Blaine K. Edwards and Prisoner Eddie Lee Marshall.³ The District Court found that Corrections Security Officers Benny K. Edwards and Blaine K. Edwards violated the Eighth Amendment and committed simple assault and simple battery on Prisoner Eddie Lee Marshall. Prisoner Eddie Lee Marshall was awarded a total of Six Hundred (\$600.00) Dollars in compensatory damages against Blaine K. Edwards and Benny K. Edwards for the use of unnecessary force in violation of the Eighth Amendment and Louisiana law. Prisoner Eddie Lee Marshall was also awarded Two Thousand (\$2000.00) Dollars from both Corrections Security Officers Benny K. Edwards and Blaine K. Edwards in punitive damages for the willful and malicious violation of his Eighth Amendment rights.

Prisoner Eddie Lee Marshall received a number of prisoner disciplinary reports immediately following this incident, including Two (2) disciplinary reports issued by Corrections Security Officer Blaine K. Edwards, and One (1) each by Corrections Security Officers Benny K. Edwards and Terry Bordelon. Prisoner Eddie Lee Marshall was found guilty on all Four (4) disciplinary reports following a prison disciplinary hearing and received a total of Thirty (30) days in isolation and a transfer to extended lockdown. Prisoner Eddie Lee Marshall appealed the finding of the prison disciplinary board to the Secretary

Corrections Security Officers Terry Bordelon, Sam Dupont, Paul I. Dupuis, Myron Dozat, and Ivy Deville assisted in ending the scuffle and were sued by Prisoner Eddie Lee Marshall for using excessive force, but were found not to have violated the Eighth Amendment or Louisiana law in that regard.

of the Louisiana Department of Corrections. The Secretary denied Prisoner Eddie Lee Marshall's appeal.

The District Court found that Prisoner Eddie Lee Marshall's Fourteenth Amendment due process rights were not violated but that Corrections Security Officers Blaine K. Edwards, Benny K. Edwards, and Terry Bordelon committed forgery under Louisiana law by placing false information in their respective disciplinary reports which caused Prisoner Eddie Lee Marshall to receive Thirty (30) days of isolation and placement in extended lockdown. Ross Maggio, Jr., Warden of the Louisiana State Penitentiary, was also found liable by the District Court under Louisiana law for negligently investigating Prisoner Eddie Lee Marshall's claim that he had been wrongfully placed in extended lockdown. On these Louisiana state law claims a total of One Thousand Two Hundred (\$1,200.00) Dollars was awarded to Prisoner Eddie Lee Marshall against Warden Ross Maggio and Corrections Security Officers Blaine K. Edwards, Benny K. Edwards, and Terry Bordelon.⁴

⁴Prisoner Eddie Lee Marshall alleged violations of his Eighth Amendment rights in regard to conditions of confinement in extended lockdown, which were dismissed by the District Court. Prisoner Eddie Lee Marshall also raised Fourteenth Amendment due process claim in regards to his being disciplined and deprived of his property, which were dismissed by the District Court because Louisiana law provides an adequate post-deprivation remedy. Prisoner Eddie Lee Marshall also alleged a number of other Louisiana law violations against C. Paul Phelps, Secretary of the Louisiana Department of Corrections, Warden Ross Maggio, Deputy Warden C. M. Lensing, Assistant Warden Roger Thomas and Corrections Security Officers Terry Bordelon, Blaine K. Edwards, Benny K. Edwards, Myron Dozat, Dave Kelone, Paul I. Dupuis, Sam Dupont, and Ivy Deville. All of which were dismissed by the District Court.

Warden Ross Maggio and Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards appealed to the Fifth Circuit. The Fifth Circuit, in a short unpublished opinion, reversed as to Warden Ross Maggio, but adopted the District Court's opinion and affirmed as to Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards.

Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards applied for a rehearing en banc which was treated as an application for rehearing and denied by the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I.

Adjudicating the pendent state law claims violates the Tenth and Eleventh Amendments

Adjudicating Prisoner Eddie Lee Marshall's pendent state law claims against Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards violates the Eleventh and Tenth Amendments to the United States Constitution and conflicts in principle with prior cases of This Court.

The doctrine of pendent state law jurisdiction is a judge-made doctrine which allows a federal court to adjudicate state law claims which arise out of the same common nucleus of operative facts as a federal law claim. Pendent state jurisdiction has no constitutional or statutory basis. See: *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 117 (1984). This Court has determined that a pendent state law claim in which pro-

spective relief is requested against a state official on the basis of state law is barred by the Eleventh Amendment. *Id.* at 121. No such specific determination has been made by This Court in regards to pendent state law claims requesting retroactive money damages against state officials. However, this Court has indicated that:

"A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. *Id.* at 106.

Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards raised the Eleventh Amendment bar as to the pendent state law claims brought by Prisoner Eddie Lee Marshall on appeal to the Fifth Circuit and in the District Court. At neither level, however, were Prisoner Eddie Lee Marshall's state law claims dismissed based on the Eleventh Amendment. The failure of the Fifth Circuit to dismiss Prisoner Eddie Lee Marshall's pendent state law claims against Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards conflicts in principle with This Court's reasoning in *Pennhurst State School and Hospital v. Halderman*, *supra.* at 99-126, and conflicts directly with the underlying principles of the Eleventh Amendment.

The conflict between the principles set out in *Pennhurst II* and the instant case, while not complete on their

face, are, nevertheless, significant and important. In *Pennhurst II* the state authorities were high ranking officials who were held to be immune in their individual capacities because of qualified immunity; the relief under review before This Court was prospective injunctive relief based solely on violations of state law. *Id.* at 91. In the instant case, no specific determination was made as to whether or not Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards were being sued in their official or individual capacities by Prisoner Eddie Lee Marshall on the pendent state law claims. In the instant suit, the relief sought and awarded to Prisoner Eddie Lee Marshall on the pendent state law claims was retroactive money damages. These discrepancies, however, are distinctions without difference.

Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards are not high ranking state officials or policy makers, but rather state employees responsible for carrying out the day-to-day tasks of a state prison.

In regards to a state law claim brought against a state employee arising out of the same common nucleus of operative facts which gave rise to a federal question, the determination of the applicability of the Eleventh Amendment does not hinge on the rank of the state actor, the relief requested, source of payment, or the capacity in which they are sued. These factors, while relevant to a determination of the applicability of the Eleventh Amendment as to the federal law claim, have no significance in regard to the state law claims under the principles set out by This Court in *Pennhurst II*. See *Id.* at 99-126.

In the instant case, Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards were performing their jobs as prison employees while dealing with Prisoner Eddie Lee Marshall. In the performance of their state duties as corrections security officers, it was found by a federal court that they violated the laws of Louisiana in handling Prisoner Eddie Lee Marshall. A federal court found that during the performance of their job as corrections security officers for the State of Louisiana that Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards committed acts of negligence on Prisoner Eddie Lee Marshall in violation of the Louisiana Civil Code Article 2315 through Louisiana Revised Statutes 14:35, 14:38, and 14:72 and awarded money damages to Prisoner Eddie Lee Marshall.

The Fifth Circuit in its affirmation of the judgment by the District Court and approval of the District Court's reasoning, instructed Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards on how to conform their conduct to the laws of Louisiana by finding that their conduct violated the laws of Louisiana. "Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.* at 106.

While a "well recognized irony" has existed regarding federal law claims brought pursuant to 42 U.S.C. Section 1983 in regards to official versus individual capacities, this may no longer be the case. See: *Will v. Michigan Department of State Police*, _____ U.S. _____, 109 S.Ct., 2304, 2309-2312(1989). No such "well recognized irony" exists under Louisiana law. Under Louisi-

ana law, the acts of negligence by corrections security officers are attributable to the State of Louisiana. Louisiana law does not strip its corrections security officers of their official or representative capacity when they perform their state job in a negligent manner and the State of Louisiana is liable for any money damages awarded. See: *Breaux v. State of Louisiana*, 326 So.2d 481, 484 (La., 1976) and La. Rev. Stat. Ann. 13:5108.1 and 5108.2. Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards cannot be stripped of their official capacity and held liable in their individual capacity for performing their state job in a negligent manner under Louisiana law.

To allow the judgment of the Fifth Circuit to stand as to the state law claims against Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards would mean that on a federal law claim the Eleventh Amendment would bar retrospective money damages, but not prospective relief. On a state law claim, the Eleventh Amendment would bar the prospective relief, but not retrospective money damages. Such a result is illogical.

This Court has, since 1976, heard and decided a number of cases involving claims brought by state prisoners against state prison officials. While This Court has never clearly articulated a reason or principle, a review of these cases indicates that state prisoners cannot or should not be allowed to bring pendent state law claims against state prison authorities in federal court. In *Estelle v. Gamble*, 429 U.S. 97 (1976) while the federal law claim under the Eighth Amendment was adjudicable in federal court, the

Texas state law claim of medical malpractice was not. In *Whitley v. Albers*, 475 U.S. 312 (1986) the federal law claim under the Eighth Amendment could be heard in federal court; however, no claims of battery or assault under Michigan law were heard. More importantly, the cases of *Parratt v. Taylor*, 451 U.S. 527 (1981); *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Daniels v. Williams*, 474 U.S. 327 (1986) and *Davidson v. Cannon*, 474 U.S. 344 (1986) appear to indicate that acts by state prison authorities on state prisoners which do not rise to the level of a Constitutional violation are matters which cannot or should not be adjudicated in federal court.⁵

Counsel for petitioners believes that the reason a federal court cannot or should not hear a state law claim by a state prisoner against state prison authorities is because that relationship is one exclusively reserved to the Several States by the Tenth Amendment.

There can be no question that the relationship between a state prisoner and state prison authorities is an essential and unique function of government. The prevention and control of criminal activity is a function which makes a state a state. See: *Hudson v. Palmer*, *supra*, at

⁵These five cases when read together clearly indicate that losses of property - *Parratt* and *Hudson* -personal injuries -*Daniels* and *Davidson*-and losses of liberty -*Olim* -by state prisoners at the hands of state prison authorities which do not rise to a Constitutional level are not matters which are authorized concerns of the federal courts. While these cases involve the Fourteenth Amendment, the principle should be no different, regardless of the federal law claims alleged, because the state law claim is not dependent on the federal law claim. See: e.g. *Estelle v. Gamble*, *supra* and *Whitley v. Albers*, *supra*.

523-528. The legal relationship between state prisoners and state prison authorities is clearly part of that essential and unique state function. The prevention and control of criminal activity within a state is as important to the governing of a state as defense and foreign relations are to the national government. The relationship between state prisoners and state prison authorities which does not run afoul of the provisions of the United States Constitution is reserved to the Several States under the Tenth Amendment. State law claims do not involve the vindication of the supreme authority of the United States Constitution, treaties or laws. See: *Pennhurst State School and Hospital v. Halderman*, supra., at 106. The hearing of a state law claim brought by a state prisoner against state prison authorities violates the power reserved to the Several States by the Tenth Amendment.

The legitimate state interest in establishing and operating a prison system for the purpose of incarcerating and punishing its convicted felons can outweigh or remove a specific protection provided under the United States Constitution to free persons and prisoners. See: *Thornburgh v. Abbott*, _____ U.S. _____, 109 S.Ct. 1874 (1989). This Court has also determined that federal courts must give great deference to the judgment of prison authorities even when their policies or actions infringe on a right guaranteed by the United States Constitution. See: *Block v. Rutherford*, 468 U.S. 576, 591 (1984). It would appear to be totally inconsistent to establish these controls on federal courts in regards to federal law claims brought by state prisoners against state prison authorities and then allow a federal court to adjudicate a state law claim brought by a state prisoner against state prison

authorities under the judge-made doctrine of pendent claim jurisdiction.

State prisoners' suits against state prison authorities account for a major part of the federal courts' case load. Adding to these federal law claims under 42 U.S.C. Section 1983, the additional burden of adjudicating state prisoners' state law claims against state prison authorities under the judge-made doctrine of pendent jurisdiction does nothing to further judicial economy or the supreme law of the land. It does violate the Tenth and Eleventh Amendments and increase the interference by the federal courts into the day-to-day operation of state prisons based not on federal law but solely on the laws of the Several States.

The Fifth Circuit has, through its ruling in regard to Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards on the pendent state law claims brought by Prisoner Eddie Lee Marshall, violated both the Tenth and Eleventh Amendments and is in conflict in principle with This Court in *Pennhurst II* and the principles set out by This Court in *Estelle*, *Hudson*, *Parrat*, *Olin*, *Daniels*, *Davidson* and *Whitley*. Plenary consideration of the matter by This Court is essential.

II.

No Eighth Amendment claim exists

This Court has never established a test to determine if an unauthorized, random, isolated act of violence by a state corrections security officer on a state prisoner can be a violation of the Eighth Amendment. This is an important and unresolved problem. The Fifth Circuit's de-

cision on this question in the instant case conflicts with decisions from other Circuits.

This Court has indicated that a claim of excessive force to subdue a prisoner must be analyzed under the Eighth Amendment standard set out in *Whitley v. Albers*, 475 U.S. 312, 318-326 (1986), *Graham v. Connor*, _____ U.S. _____, _____, 109 S.Ct. 1865, 1871 (1989). The relevant facts of the *Whitley* Balancing Test can be summarized as follows:

1. The need for the application of the force, as reasonably perceived by the responsible prison officials under the facts known to them at the time;
2. The legitimate institutional concern involved;
3. The relationship between the need and the amount of force that was used, including any efforts to temper the severity of a forceful response; and,
4. The extent of the injury inflicted. *Id.* 475 U.S. at 318-326.

The *Whitley* Balancing Test, however, presupposes that the force applied to a state prisoner by prison authorities is being used to maintain order within a prison:

"Where a prison security measure is undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff . . . The question whether the measure taken inflicted unnecessary and wanton pain and suffering (in violation of the Eighth Amendment) turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm' " *Id.* at 320-321.

Whitley does not answer the question of whether an unauthorized, isolated, random act of violence not related to

prison security measures by a state corrections security officer on a state prisoner can constitute a violation of the Eighth Amendment. This question has never been resolved by This Court and has been resolved in conflicting ways by the Circuit Courts. Compare: *Corselli v. Coughlin*, 842 F.2d 23, 26 (2nd Cir., 1988) (serious or meaningful injury not necessarily required) with *Brown v. Smith*, 813 F.2d 1187, 1189 (11th Cir., 1987) (serious or meaningful injury required) and has even been decided in conflicting ways within the Fifth Circuit. Compare: *George v. Evans*, 633 F.2d 413 (5th Cir., 1980) with the instant case.

The term "punishment" as used in the Eighth Amendment can only be construed to refer to actions officially sanctioned by a state as part of the penalty imposed on a criminal offender for his offense against society. See: *Whitley v. Albers*, supra, 475 U.S. 312, at 319, citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Punishment as used in the Eighth Amendment refers exclusively to actions or inactions by a state. Unauthorized, isolated, and random acts of violence by state corrections security officers should not constitute punishment within the meaning of the Eighth Amendment.

The Fifth Circuit in the instant case approved the factual finding that Corrections Security Officers Blaine K. Edwards and Benny K. Edwards used force on Prisoner Eddie Lee Marshall which was not related to any prison security measures. In short, Corrections Security Officers Blaine K. Edwards and Benny K. Edwards picked a fight with Prisoner Eddie Lee Marshall rather than apply force to further prison security measures. To place such acts within the meaning of punishment under

the Eighth Amendment affords Prisoner Eddie Lee Marshall greater constitutional protections than any other citizen in our society. This Court has determined that the United States Constitution does not afford a child any protection against acts of violence by his parents. See: *DeShaney v. Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998 (1989). This Court has determined that the United States constitution does not afford school children a protection against acts of physical force by school authorities. See: *Ingraham v. Wright*, 430 U.S. 651, (1976). It would appear that a constitution which does not afford a protection against acts of violence on children, but affords a protection against unauthorized, isolated, and random acts of violence by state corrections security officers on a state prisoner is something which should shock the conscience of mankind. This is not to argue that Prisoner Eddie Lee Marshall has no remedy against Corrections Security Officers Blaine K. Edwards and Benny K. Edwards for their picking a fight with him. The remedy, however, should not be the Eighth Amendment, but rather a state law claim under Louisiana Civil Code Article 2315. Merely because Prisoner Eddie Lee Marshall has been convicted of a crime and placed in prison is no reason why he should be afforded greater constitutional protections against individual acts of violence than law-abiding citizens, particularly children. Such a result is clearly repugnant to a civilized society.

It is also clear in the instant case that the use of force on Prisoner Eddie Lee Marshall by Corrections Security Officers Blaine K. Edwards and Benny K. Edwards did not inflict any serious harm on Prisoner Eddie Lee Mar-

shall. This Court has never established a serious injury requirement as an essential element of an Eighth Amendment claim in an unnecessary use of force case involving state prisoners and state prison authorities. This Court has established a serious illness or injury requirement as an essential element of an Eighth Amendment claim for denial of medical care. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). The Courts of Appeal have conflicting standards on whether or not serious injury is an essential element of an Eighth Amendment claim based on excessive force. Compare: *Brown v. Smith*, supra at 1187 with *Corselli v. Coughlin*, supra at 26. The establishment of such a requirement in this type of case is important.

If the Eighth Amendment's prohibition against cruel and unusual punishment extends to unauthorized, random, and isolated acts of force by state corrections security officers on state prisoners, then every time a prisoner is touched, a potential Eighth Amendment claim exists. To not include serious injury as an essential element of this type of Eighth Amendment claim would convert the flood of prisoner civil rights claims into a tidal wave.

The lower courts need guidelines from This Court as to the applicability of the Eighth Amendment to unauthorized, random, isolated acts of physical force not related to prison security measures on state prisoners by state corrections security officers. This Court has stated that:

"The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should be

applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged against. *Whitley v. Albers*, supra at 320.

If the Eighth Amendment is applicable in the instant case, then This Court needs to determine, in light of the objection under the Eighth Amendment, whether or not a serious injury is an essential element of the claim. Plenary consideration of the matter by This Court is essential.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If the petitioners, Corrections Security Officers Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards, are correct in urging that the Fifth Circuit had no jurisdiction to hear the pendent state law claims on the merits, the state claims should be dismissed by This Court for lack of jurisdiction. If the petitioners Corrections Security Officers Blaine K. Edwards and Benny K. Edwards are correct in urging that the Eighth Amendment prohibition against cruel and unusual punishment does not apply to unauthorized, isolated, and random uses of force on a state prisoner by a state corrections security officer, then the Eighth Amendment claim should be dismissed for failure to state a claim. If the petitioners Corrections Security Officers Blaine K. Edwards and Benny K. Edwards are correct in urging that a serious injury is an essential element of an Eighth Amendment claim involving unauthorized, random, and isolated force not related to prison security needs, the opinion of the Fifth Circuit should be reversed and judg-

ment entered in favor of Corrections Security Officers
Blaine K. Edwards and Benny K. Edwards.

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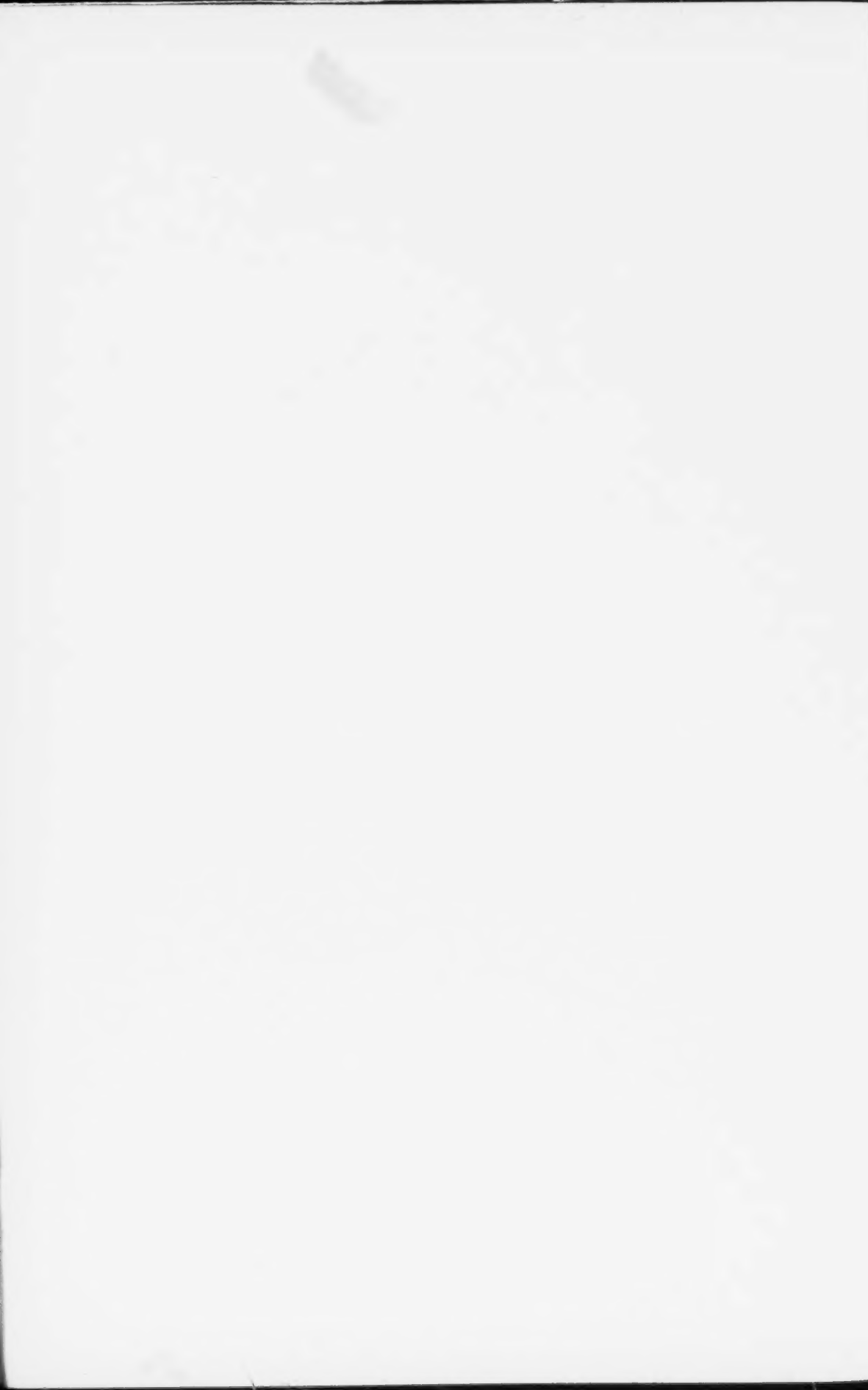
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APPENDIX



APPENDIX A

**In the United States Court of
Appeals for the Fifth Circuit**

No. 87-3724

EDDIE LEE MARSHALL,
Plaintiff-Appellee,
versus
TERRY BORDELON, ET AL.,
Defendants-Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
LOUISIANA**

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 03/08/89, 5 Cir., 198__ , __ F.2d __)
(May 16, 1989)

Before WISDOM, GEE and RUBIN, Circuit Judges.

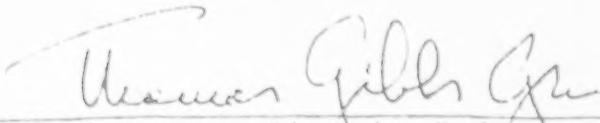
PER CURIAM:

() Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

() Treating the suggestion for rehearing en banc as a

petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



United States Circuit Judge

APPENDIX B

**In the United States Court of
Appeals for the Fifth Circuit**

No. 87-3724

EDDIE LEE MARSHALL,

Plaintiff-Appellee,

versus

TERRY BORDELON, ET AL.,

Defendants-Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
LOUISIANA
(CA-84-665-A)**

(March 8, 1989)

Before WISDOM, GEE and RUBIN, Circuit Judges.

PER CURIAM:*

We AFFIRM the judgment of the trial court, except as to defendant Ross Maggio, Jr., for the reasons stated in the careful and exhaustive opinion of the Magistrate. As to Mr. Maggio, however, we REVERSE and here RENDER judgment denying relief; any duty on the part of Mr. Maggio created by the Secretary's order to him to

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

investigate the plaintiff's allegations ran to the Secretary only, not to the plaintiff. Hence it cannot serve as a basis for liability to plaintiff Marshall by defendant Maggio.

It is so

ORDERED.

APPENDIX C

**United States District Court
Middle District of Louisiana**

CIVIL ACTION NUMBER 84-665-A

EDDIE LEE MARSHALL

versus

TERRY BORDELON, ET AL.

OPINION

This matter is before the court following a trial on the merits. The parties waived a jury trial and consented to disposition of this matter by a magistrate pursuant to 28 U.S.C. §636(c).

Plaintiff Eddie Lee Marshall,¹ an inmate at Louisiana State Penitentiary, Angola, Louisiana, brought this action pursuant to 42 U.S.C. §1983 against defendants Terry Bordelon, Blaine K. Edwards, Benny K. Edwards, Myron Dozat, Dave Kelone, C. M. Lensing, Paul I. Dupuis, Sam Dupont, Ivy Deville, former Warden Ross Maggio, Jr., Assistant Warden Roger Thomas and Secretary of Corrections C. Paul Phelps alleging various abridgments of his constitutional rights.

Specifically, the plaintiff claims that defendants Benny K. Edwards, Blaine K. Edwards, Paul I. Dupuis, Terry Bordelon, Myron Dozat, Ivy Deville and Sam Du-

¹Plaintiff appeared pro se. He has not requested appointment of counsel under 28 U.S.C. §1915, although he did request assistance from an inmate counsel substitute.

pont used excessive force against him on March 21, 1984 and thereby violated his right to be free of a deprivation of his liberty without due process of law which is guaranteed to him under the Fourteenth Amendment to the United States Constitution.

Plaintiff also claims that defendants Terry Bordelon, Blaine K. Edwards, and Benny K. Edwards issued false disciplinary reports, and did not give him copies of the disciplinary reports issued against him, thereby depriving him of due process of law again.

Plaintiff also claims that defendants Terry Bordelon and Myron Dozat confiscated his property, including legal papers, and thereby violated his right not to have his property taken without due process of law.

Plaintiff also claims that the confiscation of his legal papers amounted to a denial of access to the courts under the Sixth Amendment to the United States Constitution.

Plaintiff also claims that the conditions of his confinement in administrative lockdown amounted to cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. Plaintiff alleges that defendants C. Paul Phelps, Ross Maggio, Jr. and Dave Kellone are responsible for this violation.

Plaintiff claims that some defendants, namely, C. Paul Phelps, Ross Maggio, Jr. and C. M. Lensing, are liable for the actions of other defendants because they held positions of authority and responsibility, and because they failed to adequately investigate and review the incident.

Plaintiff claims further that in addition to these alleged violations of his federally guaranteed rights, defen-

dants Terry Bordelon, Myron Dozat, Paul I. Dupuis, Sam Dupont, Ivy Deville, Benny Edwards and Blaine Edwards committed an assault and battery upon him in violation of state laws and Department of Corrections regulations, and defendants Bordelon, Blaine Edwards and Benny Edwards issued false disciplinary reports knowing the reports would result in the plaintiff's transfer to Camp J. Maggio and Lensing violated state laws also because they failed to order the plaintiff released from Camp J after the plaintiff pointed out to them that Bordelon falsified his disciplinary report.

Plaintiff claims that all of this conduct occurred from on or about March 21, 1984 until April 19, 1984 while he was confined as an inmate at Louisiana State Penitentiary, Angola, Louisiana.

Plaintiff seeks an award for compensatory damages for injuries he claims to have suffered, and an award of punitive damages because he contends the defendants acted maliciously and wantonly. Plaintiff also seeks declaratory and injunctive relief.

I. THE EVIDENCE

The events which precipitated these claims are briefly outlined as follows. On March 21, 1984 the plaintiff and two other inmates were on the yard of Camp C, Tiger Unit, where they were housed. Blaine Edwards told the plaintiff something to which the plaintiff responded. Plaintiff was then ordered to go to his cell and pack his belongings because he was going to be issued a disciplinary report and would be moved to administrative lockdown pending his disciplinary hearing. Plaintiff went to

his cell and wrapped up his belongings in a blanket. Plaintiff carried the bundle to the lobby of the Tiger 2 Unit.

The plaintiff was met by Benny Edwards who was to conduct an inventory of the plaintiff's property before placing it in storage until the plaintiff's disciplinary board hearing was held. At this point a scuffle occurred between the plaintiff and Benny Edwards. Edwards pushed a beeper device to summon help. Defendants Blaine Edwards, Dupuis, Bordelon, Dozat, Deville and Dupont responded, although not all simultaneously.

Plaintiff was subdued, and restrained with handcuffs and leg shackles. The inventory of the plaintiff's property was done and he was taken to the prison hospital in accordance with normal prison procedure following any altercation between an inmate and a corrections officer.

Both Edwardses also were checked at the hospital.

Plaintiff was returned initially to Tiger Unit but did not leave the transport van. Instead he was taken to Camp J.

Two days later, on March 23, 1984, the plaintiff appeared before a disciplinary board charged with possession of contraband, defiance and aggravated disobedience. He was found guilty of all charges contained in four different disciplinary reports. Plaintiff was sentenced to a combined forty days in isolation and was transferred to Camp J.

ISSUANCE OF THE DISCIPLINARY REPORTS

While this basic chronology of events is undisputed, the details are seriously contested. In order to make factual findings, each witness' credibility must be consid-

ered carefully since much of the testimony is conflicting. The testimony surrounding the issuance of the various disciplinary reports afforded the most opportunities for the court to assess credibility by comparing one witness' version against another's, and both versions against documentary evidence. Therefore, the testimony relating to the disciplinary reports will be reviewed first.

At 11:40 a.m., March 21, 1984, Blaine Edwards issued the plaintiff a disciplinary report for defiance and aggravated disobedience. Exhibit P-5(I-1). Edwards stated in the report that he gave a copy of the report to the plaintiff. *See*, Exhibit P-5(I-1), Block 13.

The disciplinary board found the plaintiff guilty based on the contents of the report and the lack of a defense. Plaintiff was sentenced to a total of twenty days isolation on these two charges. *See*, *Id.*, Block 19.

Blaine Edwards also issued the plaintiff a disciplinary report for defiance at 12:00 noon in connection with the fight in the Tiger 2 Unit lobby. Exhibit P-5(I-3). Like the earlier report, it indicates that a copy was given to the plaintiff by Blaine Edwards. *See*, Exhibit P-5(I-3), Block 13.

Blaine Edwards testified that he gave copies of the disciplinary reports to the plaintiff before the plaintiff was taken to the hospital. The reports were prepared, he testified, in the Tiger 1 Unit office, but given to the plaintiff on the Tiger 2 Unit where the scuffle occurred. Also present when he gave the plaintiff the reports were Benny Edwards, Bordelon, Dupuis and a Major Barr. Plaintiff had on a white jumpsuit and was cuffed and shackled at that time. Plaintiff took the reports in his hand, Blaine

Edwards testified, but Edwards did not know what the plaintiff did with them afterwards.

Benny Edwards testified that he was at Camp C, Tiger 2 Unit when he encountered the plaintiff in the lobby. After the fight was over, he issued the plaintiff a disciplinary report for defiance, stating the incident occurred at 12:00 noon, Exhibit P-5(I-2). The report indicates that a copy was given to the plaintiff by Benny Edwards because the initials "BKE" appear in Block 13. The report contains the phrase "inmate *was* sent to the hospital." Exhibit P-5(I-2), Block 10 (emphasis added). Plaintiff was found guilty, again based on the contents of the report and the lack of a defense.

Benny Edwards testified that he gave a copy of the report to the plaintiff while he was still on the Tiger Unit. He also testified that he was present when the plaintiff was given a copy of the reports issued by Blaine Edwards.² However, he testified that when he gave the plaintiff a copy of his report it would have been about 12:30 to 12:45 p.m. and before the plaintiff went to the hospital. By this time, he testified, Blaine had already given the plaintiff copies of his two reports. The plaintiff's copies were hand written on a pink form sheet. Benny Edwards gave the plaintiff a copy of his report while the plaintiff was on the walkway between the four Tiger Units, he testified. Benny Edwards did not notice the plaintiff

²The court, mindful of the importance of credibility would play in this case, carefully observed all witnesses during each's testimony. When Benny Edwards was asked by his counsel if he was present when the plaintiff got a copy of the reports from Blaine Edwards, he answered "yes." His face also noticeably flushed red.

holding in his hand the copies of the two disciplinary reports issued by his brother, Blaine Edwards. Nor did he notice them in the chest pockets - the only pockets - of the white jumpsuit the plaintiff was wearing.

Compounding the credibility evaluation of these witnesses was the explanation of the previously quoted language from the report. The report uses the past tense to indicate that the plaintiff "was sent to the hosp. [sic]" Benny Edwards, on cross examination and in response to questions by the court, explained that the normal procedure is to send the inmate to the hospital immediately following a fight with an officer. The language used, he said, was with the anticipation that by the time the plaintiff appeared before the disciplinary board he would have been seen at the hospital. From the literal words in the report, however, he admitted it would be reasonable to conclude that the plaintiff had already been sent to the hospital when the report was prepared.

The plaintiff seized upon this language in the report and the defendants' testimony to show that, in fact, this defendant did not prepare the report, even the hand written version which should have been given to the plaintiff, until after the plaintiff had gone to the hospital. Since the plaintiff never returned to Camp C, plaintiff argues that the defendant never gave him a copy of the report. Plaintiff also argues that if he had been given the copies of the two reports issued by Blaine Edwards, Benny Edwards should have noticed them in either the plaintiff's hands, shackled in front of his waist, or in his jumpsuit chest pockets. Since no witness testified that he saw the reports on the plaintiff's person at any time, when

they should have been easily visible, the testimony that Blaine and Benny Edwards gave the plaintiff copies of their reports is not credible.

The fourth report was issued by defendant Bordelon at 3:45 p.m. charging the plaintiff with possession of contraband, a violation of Rule Number 1. Bordelon's report is significant and his hand written version is quoted in full as follows:

On this date While the above was being inventoried, I Lt. Bordelon Found a nail approx 8" long - sharpened on One side, and had a tape handle on the other side The weapon was found in pant leg in the Bundle"

Exhibit P-5(J).⁷

The report also indicates, in Block 13, that Bordelon personally gave a copy of the report to the plaintiff since his initials appear in the block. And again, the plaintiff "was found guilty based on the contents of the report and the lack of defense." Exhibit P-5(J), Block 18.

Exhibit P-8 is the Disciplinary Rules and Procedures for Adult Prisoners. A Rule 1 violation for contraband is proper for possession of a weapon. Exhibit P-8, page 4. Contraband is defined, in pertinent part, as follows:

1. *CONTRABAND (Schedule B)*: No prisoner shall have under his *immediate* control any drugs . . . , weapons (such as but not limited to, firearm, knife, iron pipe), or any other item not permitted by institutional posted policy to be received or possessed, or any other item clearly detrimental to the security of the facility, or smuggle or try to smuggle such items into or out of the facility. . . . (Emphasis added.)

Also introduced as Exhibit P-1 (2 pages).

Exhibit P-8, page 17.

Possession of contraband is a Schedule B offense which may result in a change of the inmate's custody status to medium or maximum security. Exhibit P-8, page 13, Schedule B, Penalty No. 5.

Attempted possession of contraband is defined, in pertinent part, as follows:

2. *CONTRABAND, ATTEMPTED POSSESSION OF (Schedule A)*: Contraband discovered in a location that raises a presumption of guilt against a specific prisoner (such as, but not limited to, at his feet, under his bed on the floor, next to him, but not discovered in the area of his immediate control as defined in Rule #1, is a violation.

Exhibit P-8, page 17.

A conviction of attempted possession of contraband carries a Schedule A penalty. Under Schedule A, a change in custody status to medium or maximum security is not authorized. Exhibit P-8, page 13, Schedule A Penalties.

Bordelon testified that he found the nail at about 3:45 p.m., the time indicated on the report. The uncontradicted testimony of all witnesses who addressed the point was that by that time the plaintiff had been long gone from Camp C, Tiger Unit. Various witnesses testified he left for the hospital before 1:00 p.m. and was then taken to Camp J. *See also*, Exhibit P-5(F), Answer to Interrogatory No. 30.

Bordelon, a corrections officer for many years, admitted being familiar with the disciplinary rules and procedures. He was questioned by the plaintiff and the court regarding the language of the report. He admitted that

the plaintiff was not present when the plaintiff's bundle was searched by Bordelon and when he found the nail. The uncontradicted testimony of all the witnesses was that no nail was found when defendant Duzat inventoried the plaintiff's bundle in the plaintiff's presence. Duzat and Bordelon both testified that the inmate is supposed to be present when his bundle is inventoried prior to being placed in administrative lockdown. Bordelon, however, testified that when a search is made the inmate need not be present. In an inventory, he explained, the inmate's property is only counted out by the inmate and the officer conducting the inventory lists it on an inventory sheet, but does not actually touch the inmate's property at all.

Yet Bordelon, an experienced officer, used the word "inventory" rather than "search" in his report. Plaintiff argued that Bordelon knew full well that phrasing the report as he did, the disciplinary board would assume that the plaintiff was actually present when the nail was discovered, i.e., the nail was in his immediate control.

Bordelon responded to the questions in this regard by stating that he was not present when the disciplinary board met and he does not know how the board interpreted the contents of the report.

Both the written and typed copies of the report indicate that a copy of it was given to the plaintiff by "TB" - Terry Bordelon. Exhibit P-5(J), (J-1). Bordelon admitted that he did not give a copy of the report to the plaintiff at any time and knew he would not when he signed the report. However, he stated he gave the plaintiff's copy to defendant Dupuis with instructions for him to deliver it to the plaintiff at Camp J. He did not think that this violated prison disciplinary procedures.

Dupuis testified he received a copy of the report from Bordelon and delivered it to the plaintiff at Camp J, Gator Unit, he thought, sometime between 2:00 and 4:00 p.m. After 4:00 p.m. he would have been busy transporting inmates, he testified. Dupuis did not read the report, but thought it was hand written. He was not logged in on the Camp J log book.

As he recalls, the plaintiff was in the lobby and not in a cell. He did not recall whether the plaintiff was handcuffed or shackled. Dupuis admitted he did not sign or initial the report in Block 13, where the officer giving the report to the inmate is supposed to sign. The report confirms this. He agreed that from the contents of the report, there is no way to tell that Bordelon did not give a copy of the report to the plaintiff or that he, Dupuis, did.

The affirmative testimony of the plaintiff was that by 3:45 p.m. he had been moved to Cuda Unit at Camp J.

Plaintiff also questioned Bordelon about an investigation into Bordelon's allegedly selling work assignments and homosexual favors. Bordelon testified that he believed the allegations were investigated, but no one spoke to him. Warden Butler did speak with him concerning inmates being allowed to remain in the camp with him concerning inmates being allowed to remain in the camp instead of doing their assigned work.¹

Based on the testimony and exhibits involving the issuance of the four disciplinary reports, and the court's observations of the witnesses, it does seem that the tes-

¹Through most of Bordelon's testimony he was swiveling nervously in his chair. When questioned about the investigation his face noticeably reddened.

timony of Blaine K. Edwards, Benny Edwards and Terry Bordelon is, for the most part, not credible. Blaine Edwards testified he gave copies of his report to the plaintiff while the plaintiff was still on Tiger 2 Unit. Benny Edwards testified he was present when Blaine did so. However, he later testified he was preparing his report in the Tiger 1 Unit when Blaine Edwards gave the plaintiff copies of his two reports, which supposedly occurred on the Tiger 2 Unit. Benny Edwards also testified that later a copy of his report was given to the plaintiff while the plaintiff was on the walk between the Tiger units, but he did not see the plaintiff in possession of the reports from Blaine Edwards at that time. The two pink letter size reports should have been obvious against the background of a white jumpsuit.

The language of Benny Edwards' report itself uses the past tense, indicating that it was prepared after the plaintiff had left for the hospital. Under the disciplinary rules the accusing officer is not required to be present at the disciplinary board hearing. Exhibit P-8, page 7, number 5. The contents of his report is considered as evidence by the board, as it was in this case. Benny Edwards' explanation that the report was written to reflect the occurrence of an event he presumed would occur, but which had not occurred, for the benefit of the disciplinary board is not believable. The disciplinary board members, *see*, Exhibit P-8, page 5, would presumably be aware of the policy requiring an inmate to be taken to the hospital automatically following a fight with a security officer. Why would it be necessary, or even helpful, for the defendant to make this assumption in his disciplinary report? No reasonable answer was offered by the defendant. The only

answer suggested by the evidence is that the report was prepared after the plaintiff had already left for the hospital, and consequently a copy was never given to him.

Bordelon clearly did not, himself, give a copy of his report to the plaintiff as the report indicated, and he never intended to. The credible evidence does not indicate that Dupuis did either. Bordelon claims to have prepared the report at 3:45 p.m., gave a copy of it to Dupuis who drove to Camp J and delivered it to the plaintiff at Camp J, Gator Unit, he thought, prior to 4:00 p.m. Dupuis was not logged in at Camp J at about that time, nor could he recall the names of any inmates he was transporting to Camp J at that time. Plaintiff testified that by 3:30 p.m. he had already been moved to Cuda Unit at Camp J. Except for Dupuis' uncertain testimony, there was no evidence to contradict the plaintiff's testimony in this regard.

The credible evidence proves that the plaintiff was not given copies of any of the disciplinary reports issued by Blaine Edwards, Benny Edwards or Terry Bordelon.

DISCIPLINARY BOARD HEARING

Plaintiff appeared before the disciplinary board on March 23, 1984 without receiving a copy of any of the reports. The disciplinary board was composed of Joe Lee and Bobby Oliver. Neither are defendants. Neither testified at the trial. Plaintiff was assisted by inmate counsel substitute Stanilaus Roberts. When the case was called, the plaintiff requested copies of the disciplinary reports. His request was refused. The board members, relying on the assertions made in the reports, Block 13, concluded that the plaintiff had already been given copies of the reports. Plaintiff's arguments, made through counsel sub-

stitute, were not accepted. The disciplinary board hearing went forward.

The disciplinary rules and procedures permitted the accused inmate to request a continuance which "*must* be granted on a showing of good cause; when accused did not receive adequate written notice at least 24 hours before the hearing" Exhibit P-8, page 8. This continuance is mandatory under the disciplinary rules and procedures. Plaintiff testified that he would have expected to be issued disciplinary reports for defiance and disobedience based on the yard incident and the lobby fight, but had no way to anticipate the contraband charge.

Plaintiff stated that while he knew the circumstances upon which the reports of defiance and disobedience would have been based, he could not know the language the officers would use. Therefore he could not know if the reports would leave open the possibility of a defense to the charges. The disciplinary board found the plaintiff guilty based on the contents of the report and lack of a defense.

Quite understandably, the plaintiff had no defense since he had no notice of the charges, especially the contraband charge. Moreover, the contraband charge, as written up, placed the plaintiff in the area of "immediate" control of a weapon. In fact, the plaintiff was nowhere near the weapon and the charging officer, Bordelon, knew that. Bordelon also knew that the only proper charge, assuming that he did indeed find the nail rather than plant it as suggested by another inmate witness, was attempted possession of contraband. As noted above, a conviction on this charge carries much less serious consequences.

Plaintiff's appeal of the contraband charge was denied by the Secretary of Corrections, defendant C. Paul Phelps. Phelps stated in his appeal decision that the plaintiff "contends that he did not receive a copy of the disciplinary report" and that the "evidence tended to show that the inmate did receive a copy and the board did not err in so finding." Exhibit P-5(H-2), Defendants' Response to Request for Production of Documents. The decision does not set forth what evidence in particular defendant Phelps relied upon, but presumably it was the contents of Block 13 of the report. No other evidence was presented to the disciplinary board to support this conclusion. See, Exhibit P-7, Tape Recording of Disciplinary Board Hearing.

Phelps also did not consider the plaintiff's alibi defense since it "apparently did not occur to him until this appeal." He concluded that the board did not err "by attaching more weight to the word of the reporting officer."

These remarks reflect precisely the situation sought to be avoided by giving an inmate adequate notice of the charges against him. Without such notice any meaningful defense would have to be belatedly urged. The inmate would have no opportunity to marshal what evidence he had, the board would have only the words of the complaining officer before it, and he usually would not be called as a witness or be subjected to the inmate's interrogation about the charges.

USE OF UNNECESSARY FORCE

Plaintiff testified that as he was leaning over untying his bundle for the inventory Benny Edwards grabbed him, pushed him, and started a fight. Benny Edwards testi-

fied that he bent down to untie the plaintiff's bundle and the plaintiff jumped him. Benny Edwards testified that there were no other witnesses to the beginning of the fight. Plaintiff testified that Blaine Edwards was also present.

Any argument that the plaintiff provoked the fight to distract attention and forestall the property inventory and discovery of the concealed nail is unimpressive. Plaintiff knew his property would be inventoried and the officer would not normally even touch it. He also was unescorted to and from his cell, so he could have simply left the nail in his cell. If discovered there after he had gone, the most serious offense properly chargeable would have been attempted possession of contraband. Taking the nail with him would mean risking a contraband charge and possible transfer to maximum custody status if found guilty. Also, provoking an incident during an inventory would only draw attention to himself and perhaps result in a search of his property rather than only an inventory. As it was, the plaintiff had a better chance of concealing any contraband with only defendant Benny Edwards and the plaintiff present at the inventory (taking Benny Edwards' testimony as true). There is no believable reason, supported by credible evidence, for the plaintiff to have provoked the incident with Edwards.

On the other hand, the court should also consider the motives of the Edwards defendants. A confrontation had just occurred between the plaintiff and Blaine Edwards in which the plaintiff (crediting the defendants' report, Exhibit P-5(I-1)) challenged his authority, used profanity towards him, and threatened to "stomp the first free man

I can find." Blaine Edwards testified that he took this threat seriously enough to include it in his disciplinary report and report it to his supervisor also. Yet, defendant Blaine Edwards would have the court believe that he then sent the plaintiff to pack his belongings to be inventoried by his brother Benny, acting alone. Moreover, Bordelon testified, on direct examination, that two officers should be present when an inmate's bundle is inventoried.

Based on the credibility of the witnesses, evaluated in the light of the other testimony presented by them on the other aspects of the case, the court finds that defendants Blaine Edwards and Benny Edwards provoked the incident by physically attacking the plaintiff.

Benny Edwards summoned assistance by pressing a beeper device. Bordelon, Dupont, Dupuis, Dozat and Deville responded to the beeper or otherwise came to the aid of the Edwards brothers. There is no need to go into the details of their involvement too extensively. By the time they arrived the fight was in progress. They all acted to bring it under control. The testimony does not indicate that excessive force was used to do so. The medical report notes no serious injuries, nor bruises or abrasions. A small bloody clot was noted in the plaintiff's left nostril. Exhibit P-5(P).

Dr. Kay Kovac, the prison medical director, testified that the plaintiff's medical records do not support his allegations of a severe beating. The records of Blaine and Benny Edwards disclosed a reddened left cheek and left breast noted on Benny Edwards, and an abrasion on the hand and under the left arm of Blaine Edwards.

There was a need for the use of force to bring the in-

cident under control, but there is no evidence of excessive or unnecessary use of force by Bordelon, Dupont, Dupuis, Dozat or Deville.

MEDICAL CARE

Plaintiff was taken to the hospital about an hour after the incident. He was seen by a nurse and a doctor, treated and discharged. Plaintiff testified that he made sick call from March 21, 1984 to April 11, 1984 and again while in extended lockdown, whether the officers put his name on the sick call sheet or not. There is no evidence that any defendant interfered with his medical treatment or denied him access to needed medical treatment.

PROPERTY CLAIMS

Plaintiff claims that the defendants confiscated his property and deprived him of his legal papers. He further claims that in doing so they also deprived him of access to the courts.

The records show that the plaintiff's property was placed in storage on March 21, 1984 at 12:25 p.m. and returned to him on April 12, 1984 at 1:30 p.m. Exhibit P-3, Inmate Personal Property Inventory Sheet. Plaintiff testified that he got his legal papers two or three days after his transfer to Camp J, and the rest of his property after he was transferred to Cuda 2 Unit, Left, extended lockdown on April 11, 1984. *See*, Exhibit P-6(1). This is a total of twenty-one days.

There was no testimony that the plaintiff's property was confiscated. He suffered only a temporary deprivation of his property. Nor was there any testimony that this

temporary deprivation caused him to experience lessened access to the courts.

CONDITIONS OF ADMINISTRATIVE LOCKDOWN

Plaintiff testified that he was held in administrative lockdown for twenty days before being transferred to Camp J extended lockdown. While both administrative lockdown and extended lockdown provide maximum custody, there is a difference in the privileges an inmate in extended lockdown may have which an inmate in administrative lockdown is denied.

In administrative lockdown the plaintiff was not allowed to have a comb, deodorant or hair grease. Plaintiff testified he could only shower for just a few minutes with cold water and he was issued a "piece of towel." Nor could he have his personal property, except for his legal papers, in administrative lockdown. The lights were on in his cell twenty-four hours a day and no coffee was available.

Although plaintiff's testimony on this aspect of his claim was uncontroverted, there was no testimony that these conditions were imposed only on the plaintiff or that he was treated differently from any other inmate in administrative lockdown.

Plaintiff argued that he was held for twenty days in administrative lockdown when he had been sentenced to Camp J extended lockdown. He further argued that he should have been transferred out sooner. There was no testimony that the plaintiff was not transferred out as soon as a cell became available in extended lockdown. There was no testimony as to any facts which would sup-

port the conclusion that any defendant conspired to keep the plaintiff in administrative lockdown unnecessarily or delay his transfer to extended lockdown.

DIFFERENCES BETWEEN CAMP C AND CAMP J EXTENDED LOCKDOWN

An element of the plaintiff's claim is whether he suffered any damages from any wrongful acts of the defendants. Plaintiff was sentenced to a combined forty days isolation and transfer to Camp J extended lockdown from Camp C, Tiger Unit.

Plaintiff testified that at Camp C he could watch television, earn money by selling blood plasma, have a typewriter, walk on the yard without restraints, play basketball, have physical contact visits through a screen, eat in a dining hall, purchase canteen items not available at Camp J, talk in the dorm area, and make more telephone calls than were allowed at Camp J. Also, he lived in a two man cell, whereas at Camp J there were only one man cells. In Camp J he was allowed to leave the cell for only one hour per day and could exercise by himself on the yard in restraints three days per week, weather permitting. Phone calls at Camp J could be made, but still in restraints. Plaintiff testified that he could not talk on the tier at Camp J in a normal voice. Unlike Camp C, which is a working camp, an inmate at Camp J must take his meals in his cell.

While there was, again, no testimony that the conditions imposed on the plaintiff at Camp J extended lockdown were more severe than those imposed on any other Camp J extended lockdown inmate, the conditions at

Camp C were much more amenable. Similarly, there was no testimony that any condition of confinement, whether at Camp C, Camp J extended lockdown or Camp J administrative lockdown, were inhumane, barbaric, or detrimental to the plaintiff's health.

FAILURE TO INVESTIGATE AND RELEASE THE PLAINTIFF FROM CAMP J

Plaintiff claims that he wrote to Maggio and Lensing advising them that the contraband report was false, but that they failed to investigate his allegations adequately and release him from Camp J.

Defendants admitted that the plaintiff wrote to them about the incident and sought an investigation. Exhibit P-5(A), (B)(N-1)(N-2). Phelps requested Maggio to investigate the plaintiff's allegations (Exhibit P-5(L)) in response to the plaintiff's letter of April 11, 1984. Exhibit P-5(N-2).

In his letter the plaintiff clearly sets out the same sequence of events regarding the contraband charge which he proved at the trial.

Lensing responded in a letter to the plaintiff dated April 26, 1984. Exhibit P-2. He stated as follows:

The investigation reveals that by the time that the disciplinary report was prepared, at 3:45 p.m. you had already been transferred to Camp J. The Warden's Unusual Occurrence Report indicated that the incident occurred at 12:00 p.m. The Disciplinary Report indicates that you were issued a copy of the write up.

Lensing did not testify, so it is unclear exactly what

investigation he did beyond reviewing the Warden's Unusual Occurrence Report and disciplinary report issued by Bordelon.

A review of Bordelon's Warden's Unusual Occurrence Report (Exhibit D-3) only serves to further confirm the plaintiff's allegation that Bordelon falsified the disciplinary report with the intention that the plaintiff be denied due process at the subsequent disciplinary board hearing.

Page one of the report details the lobby fight. It states the date of occurrence as March 21, 1984 and the time as 12:00 p.m. It indicates that plaintiff's dorm as Tiger-2-Right. The report states, in part, as follows:

"When I arrived Sgt. [Benny] Kyle Edwards and Sgt. Blaine Edwards explained to me - Lt. Terry Bordelon - that the above name and numbered inmate had refused to let Sgt. [Benny] Kyle Edwards inventory his belongings and had hit Sgt. [Benny] Kyle Edwards in the face"

The last paragraph of the second page states, however:

"Upon inventorying inmate Eddie Marshall by myself - Lt. Terry Bordelon - I found a forty penny nail approximately 8 inches long that had been sharpened on one end and taped on the other end."

Bordelon did not mention in his report that he did not find the nail until 3:45 p.m., and neither did the Warden's Unusual Occurrence Report filed by defendant Deville. Exhibit D-6.

Other inconsistencies also appear in his report when compared to the disciplinary reports of Benny K. Ed-

wards and the other Warden's Unusual Occurrence Reports.

The consistent testimony of all the defendants was that these reports are prepared after the incident occurs and are not given to the inmate. In this case, Bordelon did not find the nail until 3:45 p.m., so his and Deville's reports had to be prepared after that time because both include a statement about finding the nail. Both also, quite naturally, use the past tense in communicating that the plaintiff "was sent" to the hospital. So do the Warden's Unusual Occurrence Reports for Blaine Edwards and Dupuis. Exhibits D-1 and D-2, respectively. "[W]as" sent is also the exact language used by Benny Edwards in his disciplinary report.

Lensing's investigation apparently did not discover that the incident referred to in Bordelon's disciplinary report - finding the nail - did *not* occur at 12:00 p.m. as stated in two of the Warden's Unusual Occurrence Reports, but rather occurred at 3:45 p.m. as stated in the disciplinary report itself. Nor did it disclose the unchallenged fact that Bordelon did not give the plaintiff a copy of the disciplinary report, as the report indicates. Only two explanations for the statement in Lensing's letter seem plausible: (1) Lensing's "investigation" consisted of nothing more than a review of the reports, or (2) if he did interview any corrections officers regarding the nail (only Bordelon and Deville mentioned it in their reports), the officers did not inform him of the true circumstances to which Bordelon readily admitted at trial.

Maggio responded to the plaintiff's March 23, 1984 letter to him on April 13, 1984. Exhibit D-5. Plaintiff's

letter is not in evidence. Maggio made no specific finding that the plaintiff was or was not given copies of the disciplinary reports. He only states the general rule that "inmates are given copies of their disciplinary reports. . . ." Maggio found "no evidence to indicate that you were beaten by security officers on March 21, 1984," or that "anything other than necessary force was used" to control the plaintiff.

Maggio did not testify either, and there is no further indication of what, if any, investigation was done by him to support the conclusions reached in his letter.

II. FINDINGS OF FACT

After a thorough review of the testimony and documentary evidence, and an evaluation of the credibility of the witnesses, the following facts are found by the court:

1. The testimony of defendant Bordelon is wholly unworthy of belief insofar as it relates to the disciplinary report he issued to the plaintiff.

2. The testimony of Blaine Edwards and Benny Edwards is wholly unworthy of belief insofar as it relates to the provocation for the fight on the Tiger 2 Unit lobby and whether they gave the plaintiff copies of their disciplinary reports.

3. Benny Edwards and Blaine Edwards unjustifiably provoked the lobby fight and were the aggressors in it.

4. Plaintiff defended himself to the extent of offering only reasonable resistance to the Edwards brothers.

5. Plaintiff continued to resist being placed in re-

straints until after defendant Dupuis arrived and until the plaintiff was placed in restraints.

6. No unnecessary or excessive force was used against the plaintiff by any defendant involved in the fight after it was already in progress, nor after the plaintiff was placed in restraints.

7. Neither Blaine Edwards nor Benny Edwards gave the plaintiff a copy of their disciplinary reports and the plaintiff did not receive a copy of the disciplinary reports issued to him by either Edwards brother until after the disciplinary hearing was held.

8. Plaintiff did not receive a copy of the disciplinary report issued by Bordelon until after the disciplinary hearing was held.

9. The statements made by Bordelon in the report issued by him and contained in Block 10 (Description of Incident) and Block 13 (Report (copy) given to above prisoner by:) are intentional fabrications.

10. Bordelon falsified his disciplinary report with the knowledge that the disciplinary board would rely upon it as evidence against the plaintiff at the disciplinary hearing.

11. Bordelon intended by his actions and issuance of his disciplinary report that the plaintiff would be transferred to Camp J, extended lockdown.

12. Based on the contents of the disciplinary reports the disciplinary board refused to give the plaintiff copies of the disciplinary reports or grant a continuance of the hearing, despite the plaintiff's assertion that he had not

been given copies of the disciplinary reports prior to the hearing.

13. Plaintiff was found guilty of all disciplinary rule violations charged in the four disciplinary reports based on the contents of the reports and the lack of any defense.

14. Plaintiff was sentenced to a combined twenty days isolation on charges of defiance and aggravated disobedience in the first disciplinary report issued by Blaine Edwards.

15. Plaintiff was sentenced to ten days isolation on the charge of defiance in the second disciplinary report issued by Blaine Edwards.

16. Plaintiff was sentenced to ten days isolation on the charge of defiance in the disciplinary report issued by Benny Edwards.

17. Plaintiff was sentenced to Camp J extended lockdown on the charge of contraband in the disciplinary report issued by Terry Bordelon.

18. Plaintiff was held in Camp J administrative lockdown for twenty days beginning on March 21, 1984.

19. Plaintiff was transferred to Camp J extended lockdown on April 11, 1984. Plaintiff remained at Camp J until July 7, 1984. *See*, Exhibit P-6(I). During this time he served his isolation sentences given in connection with the disciplinary reports.

20. The conditions at Camp J administrative lockdown are more restrictive than at Camp J extended lockdown, which in turn are much more restrictive than those at Camp C where the plaintiff was housed on March 21, 1984 prior to his transfer to Camp J.

21. The actions of Blaine Edwards and Benny Edwards violated Employee Rule #3(a)(b), and (c). *See*, Exhibit D-4.

22. No other defendant used unnecessary or excessive force or subjected the plaintiff to corporal punishment, which would violate Employee Rule #3.

23. No defendant deprived the plaintiff of necessary medical care.

24. Plaintiff received minor injuries as the result of the fight with Blaine Edwards and Benny Edwards.

25. No defendant confiscated the plaintiff's property.

26. No defendant deprived the plaintiff of access to the courts.

27. The investigation done by defendant C. M. Lensing was inadequate to discover that the contents of defendant Bordelon's disciplinary report and Warden's Unusual Occurrence Report, insofar as it refers to the contraband charge, were false and that the plaintiff did not receive a copy of any disciplinary report prior to the disciplinary board hearing.

28. Defendant Phelps did not investigate the plaintiff's complaints.

29. Defendant Maggio did not investigate the plaintiff's complaints sufficiently to discover that the contents of defendant Bordelon's disciplinary report were false and that the plaintiff did not receive copies of any of the disciplinary reports prior to the disciplinary board hearing.

III. APPLICABLE LAW: FEDERAL

Having found that the foregoing facts were proven

by the evidence presented, the law applicable to the plaintiff's claims must afford him a remedy if he is to prevail.

The Eighth Amendment prohibits punishment "totally without penalogical justification." *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 2399 (1981). While the plaintiff has characterized his claims of excessive use of force as falling under the Fourteenth Amendment, they are more properly Eighth Amendment claims. *Whitley v. Albers*, ____ U.S. ____, 106 S.Ct. 1078 (1986) holds that the Fourteenth Amendment cannot be used as an alternative to the Eighth Amendment in a prison context.

Some state agent inflicted injury is so minor as to occasion only a tort claim, not a constitutional violation. *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981); *Williams v. Kelly*, 624 F.2d 695 (5th Cir. 1980).

In determining whether the state officer has crossed the constitutional line the court must inquire into the amount of force used in relation to the need presented, the extent of the injury inflicted and the motive of the state officer. *Shillingford, supra*.

As to all defendants except the Edwards brothers, the court has found that they used only reasonable force to control a fight not of their making. Consequently, they did not violate the plaintiff's constitutional rights. However, Blaine Edwards and Benny Edwards used unnecessary force against the plaintiff to instigate an altercation with him. There was no need to use any force until *after* these defendants started the fight by physically attacking the plaintiff. See, *U. S. v. Bigham*, ____ F.2d ____ (5th Cir. 1986); *Ware v. Reed*, 709 F.2d 345 (5th

Cir. 1983) (suggesting that any injury suffices where no force is justified). These two defendants violated the plaintiff's rights under the Eighth Amendment. Whether their actions also violated state law is discussed below.

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 291 (1976), articulated the standard applicable to Eighth Amendment claims based on a denial of medical care: the plaintiff must prove "deliberate indifference to serious medical needs." Plaintiff's medical needs were not serious and were adequately addressed. No defendant deprived the plaintiff of his rights under the Eighth Amendment to adequate medical treatment.

Plaintiff makes substantial claims against defendants Blaine Edwards, Benny Edwards and Terry Bordelon arising out of their issuance of false disciplinary reports and their failure to provide the plaintiff with copies of those reports. The mere issuance of a false disciplinary report does not amount to a denial of due process. *Collins v. King*, 743 F.2d 248 (5th Cir. 1984). The disciplinary procedures in effect at Louisiana State Penitentiary were previously approved by this court in *Ralph v. Dees*, CA 71-94 (M.D.La.); *Williams v. Edwards*, CA 71-98-B (M.D.La.), *affirmed*, 547 F.2d 1206 (5th Cir. 1977).

An isolated instance of the failure to follow those procedures does not violate federally protected rights, *Collins v. King*, *supra*; *see, Hudson v. Palmer*, ____ U.S. ____, 104 S.Ct. 3194 (1984). When the state provides adequate post-deprivation remedies for a random and unauthorized, *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), deprivation of property or liberty, *Thibodeaux v. Bordelon*, 740 F.2d 329 (5th Cir. 1984), no

procedural due process violation has occurred. *Hudson v. Palmer, supra*; *Holloway v. Walker*, ____ F.2d ____ (5th Cir. 1986). If the laws and regulations providing due process exist, but are systematically ignored, then a deprivation of liberty or property, though technically unauthorized, would not be random. *Holloway, supra*. However, the plaintiff presented no proof that the disciplinary hearing procedures are systematically ignored. Similarly, the protections of the Due Process Clause of the Fourteenth Amendment, whether procedural or substantive, are not triggered by a lack of due care by prison officials. *Davidson v. Cannon*, ____ U.S. ____, 106 S.Ct. 668 (1986); *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 662 (1986). Plaintiff's Fourteenth Amendment claim here involves procedural due process only.

To recover, then, the plaintiff must prove that the State of Louisiana does not provide adequate post-deprivation remedies. Such an argument, under the facts of this case, is foreclosed by *Thibodeaux v. Bordelon, supra*, which found that Louisiana affords a plaintiff a tort cause of action under Louisiana Civil Code articles 2315-2317. Whether the plaintiff has asserted and proven a claim under Louisiana law against these three defendants will be discussed below.

Insofar as the plaintiff asserts a Fourteenth Amendment claim for deprivation of property, that claim must fail because he was not deprived of any property. Likewise, his claims related to denial of access to the courts from loss of legal papers must also fail because no such loss was proven.

Plaintiff's claims under the Eighth Amendment for

cruel and unusual punishment due to the conditions of Camp J administrative lockdown are likewise unproven. The evidence is insufficient to prove that the restrictions placed on the plaintiff while at Camp J offend contemporary standards of decency when the totality of the conditions is considered. *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392 (1981).

Plaintiff asserts claims against Phelps, Maggio and Lensing because in their capacities as Secretary of Corrections, Warden and Assistant Warden, respectively, they hold positions of authority over and responsibility for the conduct of the other defendants. It is well settled that a state supervisory official cannot be held liable for the actions of his subordinates under section 1983 solely on the basis of vicarious liability. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978); *Gibbs v. King*, 779 F.2d 1040 (5th Cir. 1986); *Barksdale v. King*, 699 F.2d 744, 746 (5th Cir. 1983).

In the absence of direct personal participation by the supervisory official in the constitutional tort, a plaintiff must allege and prove that the deprivation of his constitutional rights occurred either as a result of a subordinate's implementation of the supervisor's affirmative wrongful policies, or as a result of a breach by the supervisor of an affirmative duty specially imposed upon him by state law. *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983).

None of these three defendants directly participated in any of the events of March 21, 1984. Nor was there any proof that they promulgated, condoned or approved any policy which led to any violation of the plaintiff's consti-

tutional rights. Plaintiff has not pointed out or proven any affirmative duty imposed upon any of them by state law.

Plaintiff has, however, proven that Lensing's investigation failed to discover the true, undisputed facts regarding Bordelon's report, or to discover that the plaintiff did not receive copies of any of the disciplinary reports prior to the disciplinary board hearing. Whether his failure to do so supports claims under state law will also be discussed below.

APPLICABLE LAW: STATE

Plaintiff asserts state law claims against defendants Bordelon (Complaint, ¶IV, Statement of Claim, Facts, subparagraphs 59, 61, 62), Maggio and Lensing (subparagraph 60), Dozat, Dupuis, Dupont, Deville (subparagraph 61), Blaine Edwards and Benny Edwards (subparagraphs 61, 63). He refers to violations of Louisiana Department of Corrections regulations and state criminal offenses of perjury, forgery, simple battery, aggravated assault and conspiracy. Plaintiff makes no specific statutory references in his complaint. While assault and battery are criminal law terms, Louisiana has long recognized that they may also form a foundation for a civil claim against a law enforcement officer. *Knuckles v. Beaugh*, 392 So.2d 710 (La.App.3rd Cir. 1980); *Berryman v. International Paper Company*, 139 So.2d 806 (La.App.3rd Cir. 1962); *Dufrene v. Rodrigue*, 38 So.2d 511 (La.App.1st Cir. 1949). See, LSA-R.S. 14:6.

Plaintiff also refers to claims against defendants Bordelon, Blaine Edwards and Benny Edwards for making false disciplinary reports which led to his transfer to Camp J. These allegations are sufficiently detailed to

come under the umbrella of Louisiana Civil Code article 2315, the state's general tort statute.

Assault and Battery

An assault in Louisiana is defined as an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery. LSA-R.S. 14:36. An aggravated assault is an assault committed with a dangerous weapon. LSA-R.S. 14:37. Simple assault is an assault committed without a dangerous weapon. LSA-R.S. 14:38. A battery is defined, in pertinent part, as the intentional use of force or violence on a person of another. LSA-R.S. 14:33. An aggravated battery is a battery committed with a dangerous weapon. LSA-R.S. 14:34. Simple battery is a battery committed without the consent of the victim. LSA-R.S. 14:35. There was no credible proof that any defendant used any weapon on the plaintiff, nor any object though not a weapon, which would elevate a simple assault or battery to the aggravated state. The preponderance of the credible evidence does prove that the plaintiff was the subject of a simple assault and a simple battery by defendants Blaine Edwards and Benny Edwards when they provoked the lobby incident by attacking him without provocation. There was no testimony that he consented to their use of force or violence upon him, nor were there any circumstances from which his consent could be inferred. *See, White v. Gill*, 309 So.2d 744 (4th Cir. 1975).

The other defendants involved in the lobby incident acted within the bounds of their authority, with reasonable force, to get the plaintiff under control and therefore committed no assault or battery upon him. *See, LSA-R.S.*

14:18(1), *Myles v. Falkenstein*, 317 So.2d 292 (La.App.4th Cir. 1975).

Conspiracy

Plaintiff also contends that defendant Bordelon violated state laws of conspiracy, perjury and forgery through the statements made in his report that he found a weapon in the plaintiff's property. A conspiracy, LSA-R.S. 14:26, must involve two or more persons in an agreement to commit a crime. Here, the evidence does not show that Bordelon agreed to act in concert with anyone else. He acted alone. Both Edwardses made statements in their reports which the court has found to be false and misleading. However, there was no preponderance of evidence that the Edwards brothers acted in concert with each other or with anyone else either.

Forgery

Forgery is the false making, or altering with intent to defraud, of any signature to, or any part of, any writing purporting to have legal efficacy. LSA-R.S. 14:72, *Schermayder v. New Orleans Police Department*, 474 So.2d 461 (La.App.4th Cir. 1985). Plaintiff proved by a preponderance of the evidence that Bordelon's disciplinary report was false in two material respects. First, the nail was not found during an "inventory." Second, he did not give a copy of the report to the plaintiff. Both aspects are critical to the subsequent finding of guilt by the disciplinary board and the plaintiff's complete inability to defend against the charge. Bordelon had the "intent to defraud" plaintiff of his right to a fair and meaningful disciplinary board hearing. He also knew that a finding of guilt would almost certainly result in a transfer of the

plaintiff to Camp J with its harsh, restrictive conditions. *State v. Raymo*, 419 So.2d 858 (La. 1982); *State v. Marler*, 428 So.2d 954 (La.App.1st Cir. 1983).

His disciplinary report was a writing of legal efficacy since it formed the basis for a quasi-judicial proceeding which would determine guilt or innocence, and which proceeding was a mandatory, integral part of the disciplinary rules and procedures designed to protect an inmate from the loss of his constitutional rights. *See, Ralph v. Dees, supra*; *State v. Ward*, 482 So.2d 182 (La.App.4th Cir. 1986); *see also*, LSA-R.S. 14:72, Reporter's Comments.

An argument can be made that forgery requires that the false information be made by someone other than the person executing the writing. *State v. Marler, supra*. Adopting this construction, however, does not alter the fact that the statements contained in the document were false, were placed there purposefully with the intent to deprive the plaintiff of his right to a fair hearing, and would constitute a fraud. La.C.C.Art. 1953, formerly C.C.Art. 1847(6). Bordelon's report was a forgery, or at least was fraudulently made.

Similarly, the reports by Blaine Edwards and Benny Edwards also contained materially false information insofar as they state that the plaintiff attacked Benny Edwards without provocation and that the plaintiff was given copies of these reports. Their reports also are either forgeries, or were at least fraudulently made.

Perjury

While statements made by these three defendants in their reports were false, no perjury was committed. Per-

jury requires that the statements be made under oath or affirmation. LSA-R.S. 14:123. None of these reports was made under oath or affirmation.

Negligent Investigation

Plaintiff has proven that Lensing and Maggio did not investigate his claims adequately and hence failed to discover that the disciplinary reports contained materially false information. Defendants did not show what investigation was actually done by either of them, beyond what is gleaned from their written replies to the plaintiff.

Plaintiff bears the burden of proving all elements of his claim by a preponderance of the evidence. *Stephens v. State Through Department of Transportation and Development*, 440 So.2d 920 (La.App.2d Cir. 1983). Plaintiff must prove that the defendants owed him the duty to investigate his allegations, that they breached this duty, that the breach of this duty caused him harm that was foreseeably associated with the breach, and the harm was of the type of injury the duty was designed to prevent. *Stephens, supra*. The proof may be by direct or circumstantial evidence. *Gums v. Delta Downs, Inc.*, 425 So.2d 303 (La.App.3rd Cir. 1982). The disciplinary rules and procedures, plaintiff Exhibit P-8, pp. 2, 8, do provide for an investigation, but for purposes of the initial disciplinary board hearing only. Plaintiff offered no evidence that the disciplinary rules imposed any duty to investigate his allegations once the disciplinary board had concluded its hearing. Plaintiff's appropriate avenue of relief was to appeal the disciplinary board finding to the Secretary of Corrections. Plaintiff presented no proof that the Secretary has a duty to conduct any investigation beyond what was of record before the disciplinary board.

That Phelps did order Maggio to investigate plaintiff's allegations is commendable, but the fact that an investigation was ordered does not establish that Phelps had any duty to do so.

Maggio, however, did have such a duty once he had been instructed by Phelps to investigate the allegations. As noted in the factual findings, Maggio's investigation was negligible or non-existent. Had an adequate investigation been done, it would have revealed, at the least, that Bordelon had not given the plaintiff a copy of his report before the hearing, thereby making it very probable that a new hearing would have been ordered on the contraband charge. It is apparent that the duty to investigate is designed to ferret out the truth and to correct any errors which may have occurred as quickly as possible. It is entirely foreseeable that a negligently conducted investigation would result in the plaintiff being retained in Camp J extended lockdown. Plaintiff has proven that Maggio's inadequate, negligently conducted investigation caused him harm.

Lensing responded directly to the plaintiff's March 21, 1984 letter. There was no testimony that Lensing was acting under instructions from Maggio or Phelps, rather than taking it upon himself to investigate the plaintiff's allegations. Nor was there any evidence to show that his position as Deputy Warden required him to routinely investigate such complaints without an order from the Warden.

Respondent Superior/Vicarious Liability

Plaintiff listed his causes of action in paragraphs 52-64 of the complaint. His state law claims against Lensing

and Maggio are contained in paragraph 60. Although paragraph 57 contains allegations against Lensing and Maggio, as well as Phelps, these allegations specifically claim a Fourteenth Amendment due process violation related to inadequate investigation of the incident. Plaintiff's complaint, broadly read, *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972), does not allege that Lensing, Maggio or Phelps are vicariously liable for the acts of the other defendants under a theory of respondeat superior. La.C.C.Art. 2320.

V. DAMAGES

Plaintiff has proven by a preponderance of the credible evidence that defendants Blaine Edwards and Benny Edwards violated his rights under the Eighth Amendment by the intentional use of unnecessary force, and also committed a battery on him. Plaintiff is entitled to recover damages under federal and state laws on this claim. 42 U.S.C. §1983; La.C.C.Art. 2315.

Plaintiff has proven that both Edwardses and Bordelon caused him harm by their making false disciplinary reports against him and then not providing him copies of them prior to his disciplinary board hearing. Plaintiff is entitled to recover damages under state law on these claims. La.C.C.Art. 2315.

Finally, plaintiff proved that Maggio breached his duty to investigate the plaintiff's allegations which was a cause in fact of the plaintiff's retention in Camp J. Damages are recoverable for this claim under state law also. La.C.C.Art. 2315.

When a section 1983 plaintiff seeks damages for vi-

olation of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts. Damages in tort cases are designed to provide compensation for the injury caused by the defendant's breach of a duty. *Carey v. Phipus*, 435 U.S. 247, 255, 98 S.Ct. 1042 (1978), *Williams v. McNeil*, 432 So.2d 950, 954-955 (La.App.4th Cir. 1983).

The physical injuries caused by Blaine Edwards and Benny Edwards were not serious and were treated promptly. An award of \$600.00 is adequate compensation for these injuries. *See, Barras v. Touchet*, 467 So.2d 172 (La.App.3rd Cir. 1985).

While personal humiliation and mental anguish and suffering are also compensable under section 1983, *Carey v. Phipus*, *supra*, *Hinshaw v. Doffer*, 785 F.2d 1260 (5th Cir. 1986), as well as La.C.C.Art. 2315, the plaintiff has presented no credible proof of any personal humiliation or mental anguish and suffering caused by the use of force by these defendants.

Plaintiff's confinement in Camp J extended lockdown subjected him to more restrictive conditions than those applicable to Camp C. Placing an itemized monetary value on each privilege lost is not possible and will not be attempted. *See, Ricard v. State*, 390 So.2d 882 (La. 1980), La.C.C.Art. 1934(3), now C.C.Art. 1999, 2324.1. Compensation for damages caused by a breach of state law by the Edwardses, Bordelon and Maggio - which all contributed to the Camp J confinement from March 21, 1984 to July 7, 1984 - can be analogized to damages arising from false imprisonment. However, in looking to state court damage awards for guidance, the court must keep in mind

that the plaintiff here is an inmate whose liberty has already been lawfully restricted. *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 869 (1983). Considering the privileges lost, the additional restrictions imposed on Camp J inmates and the length of confinement at Camp J, an award of \$1,200.00 is adequate compensation for the damages the plaintiff sustained.

Plaintiff also seeks an award of punitive damages. Plaintiff has proven only one claim under section 1983 against the Edwards brothers for unnecessary use of force in violation of the Eighth Amendment. Punitive damages may be awarded when there is proof of willful or malicious conduct motivated by evil intent. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625 (1983). Plaintiff presented credible evidence to show that the Edwardses' actions were willful and were motivated by evil intent.

The function of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior. Plaintiff, like other inmates, is in a particularly disadvantageous position because he lacks the physical freedom to avoid future encounters with these defendants or other corrections officers who may be in a position to abuse their authority. Deterrence, then, is a paramount consideration.

The court has no illusions about the plaintiff being a model prisoner. He certainly is not. He had one hundred and fifty-three disciplinary rule violations prior to March 21, 1984 and received several more the next month. Exhibit P-6(H), Conduct Report. Plaintiff's location sheets, Exhibit P-6(I), show frequent trips to administrative

lockdown through December 1984, indicative of the issuance of disciplinary reports.

However, the evidence presented in this case shows that the plaintiff's rights were willfully violated by the Edwardses. Punitive damages in the amount of \$2,000 each against Blaine Edwards and Benny Edwards is adequate to accomplish the goal of both punishment and deterrence.

Plaintiff cannot be awarded punitive damages on his state law claims, however. They are not available under Louisiana law. *Ricard v. State, supra*.

CONCLUSION

Plaintiff is awarded compensatory damages against Blaine K. Edwards and Benny K. Edwards, in solido, in the sum of \$600.00 for the use of unnecessary force against the plaintiff in violation of the Eighth Amendment and state laws.

Plaintiff is awarded compensatory damages against defendants Blaine K. Edwards, Benny K. Edwards, Terry Bordelon and Ross Maggio, Jr., in solido, in the sum of \$1,200.00 on the plaintiff's state law claims of forgery and negligence.

Plaintiff is awarded punitive damages against defendants Blaine K. Edwards and Benny K. Edwards in the sum of \$2,000.00 each for the willful, malicious violation of the plaintiff's Eighth Amendment rights.

Interest is awarded from the date of judicial demand on the compensatory damages and from the date of judgment on the punitive damages.

46a

Judgment will be entered accordingly.

Baton Rouge, Louisiana, July 7, 1987.


UNITED STATES MAGISTRATE

APPENDIX D

**United States District Court
Middle District of Louisiana**

CIVIL ACTION NUMBER 84-665-A

EDDIE LEE MARSHALL
versus
TERRY BORDELON, ET AL.

JUDGMENT

For written reasons assigned:

Judgment is rendered in favor of the plaintiff, Eddie Lee Marshall, against Blaine K. Edwards and Benny K. Edwards, in solido, in the sum of six hundred dollars (\$600.00) for compensatory damages; against Blaine K. Edwards, Benny K. Edwards, Terry Bordelon and Ross Maggio, Jr., in solido, in the sum of one thousand two hundred dollars (\$1,200.00) for compensatory damages; and against Blaine K. Edwards and Benny K. Edwards in the sum of two thousand dollars (\$2,000.00) each for punitive damages. Interest is awarded from the date of judicial demand for compensatory damages and from the date of judgment for punitive damages.

Baton Rouge, Louisiana, July 22, 1987.


UNITED STATES MAGISTRATE

APPENDIX E

Louisiana Civil Code Article 2315

Liability for acts causing damage; survival of action

Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action sur-

vived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

APPENDIX F

Louisiana Revised Statutes 13:5108.1

**Indemnification of officers and employees of the state,
civil rights; representation by attorney general**

A. It is hereby declared to be the public policy of this state that the state shall hold harmless and indemnify all officers and employees of the state from any financial loss which, for purposes of this Section, shall mean and include court costs, judicial interest, and monetary damages, arising out of any claim, demand, suit, or judgment in federal court brought pursuant to the provisions of Sections 1981 through 1983 of Title 42 of the United States Code by reason of alleged negligence or other act by an officer or employee, provided that such officer or employee at the time damages were sustained was acting in the discharge of his duties and within the scope of his employment and that such damages did not result from the intentional wrongful act or gross negligence of such officer or employee.

B. Within five days of the time the officer or employee is served with any summons, complaint, process, notice, demand, or pleading, he shall deliver the original or a copy thereof to the attorney general. Upon such delivery the attorney general shall assume control of the defense of such officer or employee, unless it shall appear that the officer or employee was acting outside the scope of his employment. Such officer or employee shall cooperate fully with the attorney general's defense. The decision of the attorney general not to defend an officer or employee, and any and all information obtained by him as a result of any investigation related thereto, shall be con-

sidered confidential and shall not be admissible as evidence in any legal proceeding, and no reference thereto shall be made in any trial or hearing. Delivery of the summons, complaint, process, notice, demand, or pleading to the attorney general, as required herein, constitutes a prerequisite to indemnification by the state. Upon delivery to the attorney general, the attorney general shall, within five days, furnish a copy of the summons, complaint, process, notice, demand, or pleading to the legislative auditor.

C. Should an officer or employee of the state be held liable for monetary damages for actions arising under the circumstances provided by this section, the legislature shall appropriate a sum sufficient to reimburse the officer or employee.

D. No such payment shall be made until a judgment of a court of competent jurisdiction has become final, or until a monetary settlement approved by the attorney general is reached on behalf of the officer or employee, and such judgment or settlement has decreed that the officer or employee was acting in the discharge of his duties and within the scope of his employment and that the damages did not result from the intentional wrongful act or gross negligence of such officer or employee. The court, upon request by a party, shall make specific findings of fact as to whether the officer or employee was acting in the discharge of his duties and within the scope of his employment and whether the damages were the result of the intentional wrongful act or gross negligence of such officer or employee.

E. Suit shall be instituted by the attorney general

against the legislative auditor in the district court of the parish in which the state capital is situated in any case where an officer or employee is held liable for damages for actions arising under the circumstances provided by this Section and jurisdiction over such suit is hereby conferred on said court. The proceeding shall be conducted by the court and shall be confined to the record comprising the federal action. The court, upon request, shall hear oral argument and receive written briefs. If, before the date set for the hearing on oral argument or the filing of written briefs, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there was a good reason for failure to present it in the proceeding before the federal court, the court may order that the additional evidence be received upon conditions determined by the court. Any judgment rendered by such court shall be subject to appeal as in other civil matters. Such suit may be instituted under the laws applicable to declaratory judgments and any such suit shall be regarded as presenting a justiciable controversy between the attorney general and the legislative auditor.

F. Nothing in this Section shall in any way impair, limit or modify the rights and obligations of any insurer under any policy of insurance, nor shall it impair the right of the individual to obtain private counsel in his own behalf. However, the state shall not be obligated to indemnify said individual for the attorney fees so incurred unless the attorney general had determined not to assume the defense of an individual in accordance with Subsection B of this Section, and the court subsequently finds

that the officer or employee was acting in the discharge of his duties and within the scope of his employment and the damages did not result from the intentional wrongful act or gross negligence of the officer or employee.

G. The benefits of this section shall inure to officers and employees of the state, or upon the death of such officers and employees shall be inherited by his legal, instituted or irregular heirs subject to the community rights of the surviving spouse.

APPENDIX G

Louisiana Revised Statute 13:5108.2

Indemnification of officials, officers, and employees of the state

A. (1) As used in this Section, an official, officer, or employee of the state means such a person holding office or employment:

(a) In the executive branch of state government or in any department, office, division, or agency thereof.

(b) In the legislative branch of state government or in any house, committee, or office thereof.

(c) In any of the family, juvenile, or judicial district courts of the state or in the offices of the judicial administrators thereof.

(d) In one of the circuit courts of appeal or in the office of clerk thereof.

(e) In the state supreme court or in the office of the clerk thereof or office of judicial administrator thereof.

(f) In one of the deep-water ports, deep-water port commissions, or deep-water port, harbor, and terminal districts.

(2) As used in this Section, an "official", "officer", or "employee" of the state does not include an official, officer, or employee of a municipality, ward, parish, special district, including without limitation a levee district, school board, parish law enforcement district, or any other political subdivision or local authority other than a deep-water port, deep-water port commission, or deep-water port, harbor, or terminal district whose functions

have not been transferred to a state department or office or agency thereof, nor shall "official", "officer", or "employee" of the state include the parish officials set forth and named in Article VI, Sections 5(G) and 7(B) of the Constitution of Louisiana, nor the officials, officers, or employees thereof, nor justices of the peace, constables, mayor's courts, city courts, marshals, nor the officials, officers, or employees thereof.

B. It is hereby declared to be the public policy of this state that the state shall hold harmless and indemnify each official, officer, and employee of the state from any financial loss which, for purposes of this Section, shall mean and include court costs, judicial interest, and monetary damages, arising out of any claim, demand, suit, or judgment in any court by reason of alleged negligence or other act by the official, officer or employee, if the official, officer, or employee, at the time damages were sustained, was acting in the discharge of his duties and within the scope of his office or employment and such damages did not result from the intentional wrongful act or gross negligence of the official, officer, or employee.

C. Within five days after an official, officer, or employee is served with any summons, complaint, process, notice, demand, or pleading, he shall deliver the original or a copy thereof to the attorney general or, if he is employed by a department, office, or agency in any branch of state government, or a deep-water port, deep-water port commission, or deep-water port, harbor, or terminal district which is authorized to employ its own attorney, he shall deliver same to the attorney so engaged. Failure to make the required delivery under this Section to the

attorney general or the duly engaged attorney shall preclude indemnification hereunder. Upon delivery to the attorney general or the duly engaged attorney, the attorney general or the duly engaged attorney shall, within five days, furnish a copy of the summons, complaint, process, notice, demand, or pleading to the legislative auditor. Upon such delivery the attorney general or the attorney engaged by the department, office, agency, deep-water port, deep-water port commission, or deep-water port, harbor, or terminal district shall assume control of the defense of the official, officer, or employee, unless:

(1) The officer or employee states in writing that he does not wish to be represented by the attorney general or the attorney for the employing department, agency, commission, or other authority. In such instance, neither the employing authority nor the state shall be responsible for the fee of any counsel retained by the officer or employee.

(2) The officer or employee is covered by a policy of insurance under the terms of which the insurance carrier is required to provide counsel and the insurance carrier does in fact provide a defense for the full extent of the claims made against the officer or employee.

(3) After thorough investigation by the attorney general or the attorney for the employing department, agency, commission, or other authority, it appears that the officer or employee was not acting in the discharge of his duties and within the scope of his office or employment at the time of the alleged act or omission, or that he was acting in an intentionally wrongful manner or was grossly negligent; provided that the state shall not be ob-

ligated to indemnify said officer or employee for attorney fees incurred, unless the attorney general or duly engaged attorney had determined not to assume the defense of said officer or employee based on his investigation, and the court subsequently finds that the officer or employee was acting in the discharge of his duties and within the scope of his employment and the damages did not result from the intentional wrongful act or gross negligence of said officer or employee.

(4) After thorough investigation, it appears that representation of the officer or employee would conflict with the representation of another officer or employee of the state. In case of such a conflict, the attorney general or the attorney for the employing department, agency, commission, or other authority, shall secure special counsel to represent the officer or employee at state expense.

D. In any case where the attorney general, or the attorney for the employing department, agency, commission, or other authority does not undertake the representation of the officer or employee he may take such action as he deems necessary including enrolling as co-counsel, to protect the interests of the state.

E. The decision of the attorney general or of the attorney for the employing authority, department, agency, commission, or other authority, not to defend an officer or employee and any and all information obtained by him as a result of the investigations conducted pursuant to Paragraph (3) or (4) of Subsection C shall be considered confidential and shall not be admissible as evidence in any legal proceeding and no reference thereto shall be made in any trial or hearing.

F. Subject to the requirements of Subsection G of this Section, if an official, officer, or employee of the state is held liable for monetary damages for actions arising under the circumstances provided by this Section, the legislature shall appropriate a sum sufficient to reimburse the official, officer, or employee. The court, upon request of any party, shall give written findings of fact as to whether the official, officer, or employee was acting in the discharge of his duties and within the scope of his employment, and whether the damages were the result of the intentional wrongful act or gross negligence of the official, officer, or employee. An out of court settlement shall have the effect of a judgment of a court of competent jurisdiction for purposes of this Section, but the settlement shall be approved by the attorney general.

G. If a monetary judgment for damages against the official, officer, or employee is rendered by a competent court or if a monetary settlement approved by the attorney general is reached on behalf of the official, officer, or employee in actions arising under the circumstances provided by this Section, suit shall be instituted by the attorney general against the legislative auditor in the district court of the parish in which the state capital is situated for the amount of the judgment or settlement, and jurisdiction over such suit is hereby conferred on said court. The proceedings shall be conducted by the court and shall be confined to the record comprising the federal¹ action. The court, upon request, shall hear oral argument and receive written briefs. If, before the date set for the

¹ In subsec. G, "federal" is as it appears in the enrolled bill.

hearing on oral argument or the filing of written briefs, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there was good reason for the failure to present it in the proceeding before the federal¹ court, the court may order that the additional evidence be received upon conditions determined by the court. Any judgment rendered by such court shall be subject to appeal as in other civil matters. — Such suit may be instituted under the laws applicable to declaratory judgments and any such suit shall be regarded as presenting a justiciable controversy between the attorney general and the legislative auditor. If the decision in the original suit is that the employee was acting in the discharge of his duties and within the scope of his employment and was not guilty of an intentional wrongful act or gross negligence, then the legislature shall appropriate the sum required to reimburse the official, officer, or employee.

H. Nothing in this Section shall in any way impair, limit, or modify the rights and obligations of any insurer under any policy of insurance or impair the right of the individual to obtain private counsel in his own behalf. However, the state shall not be obligated to indemnify said individual for the attorney fees so incurred, except as provided in Paragraph C(3) of this Section.

I. The benefits of this Section shall inure only to officials, officers, employees of the state or, upon the death of the affected official, officer or employee, to his legal, instituted, or irregular heirs, subject to the community

¹ In subsec. G, "federal" is as it appears in the enrolled bill.

rights of surviving spouse, which, however, shall not enlarge or diminish the rights of any other party.

J. If an official, officer, or employee of the state is held liable for monetary damages for actions covered by this Section, he and his insurer shall be entitled to a suspensive appeal, without bond.